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IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Clarence E. Lewis,
Appellant.

vs.

The United States of America,
Appellee.

APPELLANT'S OPENING BRIEF.

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INTRODUCTION.

This is an appeal from a judgment of conviction against the defendant below, finding him guilty of a violation of section 1 and 8 of the Harrison Narcotic Act, and sentencing him to serve a term of four years at McNeil Island. [Rep. Tr. p. 27.]

The appellant was indicted under two counts; the first count charging that he did *deal in* and *distribute certain narcotics, without having registered and paid the tax*, as required by section 1 of the Harrison Narcotic Act; and the second, charging that he *did sell, barter, exchange* and *give away*, certain narcotics not in pursuance to a written order, and the said

defendant was a person required to register and pay the special tax (section 2 Harrison Narcotic Act). [Rep. Tr. p. 305.]

The jury returned a verdict of guilty on the first count, and not guilty on the second count [Rep. Tr. p. 22], and judgment was rendered accordingly, and sentence imposed.

STATEMENT.

The facts briefly show that certain police officers, of the City of Los Angeles, were approached by a notorious addict, one Morris, who told them that he knew where he could buy morphine. That pursuant to such information, the officers followed Morris to Eighth and Hemlock street, in the city of Los Angeles, where Morris met the defendant, another addict, at which meeting defendant had something in his hand. That upon the approach of the officers, the defendant tossed the something in his hand away, and upon the officers coming up, Morris still had his marked bills in his hand, and upon a search, the officers found a package which contained narcotics. Upon a further search of the defendant's room and trunk, they found other narcotics which were produced and offered in evidence. Morris was not produced as a witness upon the trial, and the officers were not able to testify as to any conversation between the defendant and Morris, but only as to the physical acts of the parties, as above enumerated. However, the defendant on his own behalf took the

stand, and testified that because of injuries received in the World War, he had become an addict, but he denied that he had any dealings or conversation with Morris concerning narcotics, and as well, produced reputable witnesses who testified as to his good moral character as a law-abiding citizen.

After the introduction of this evidence, among other instructions the court said:

"I do not think you need pay very much attention to the second count, because of the condition of the evidence. But the evidence is to the point that he was dealing in narcotics, and it is for you to say now what the worth and weight of that evidence is." [Rep. Tr. p. 69.]

After such an instruction, needless to say, as above stated, the jury returned a verdict of guilty as to the first count, and not guilty as to the second.

During the course of the trial, the defendant duly objected and excepted to the introduction of the evidence concerning the exhibits [See bill of exceptions, Rep. Tr. p. 29 *et seq.*], and thereafter duly and regularly moved to vacate and set aside the verdict, and grant a new trial upon the grounds:

That the verdict is contrary to the law.

That the verdict is contrary to the evidence.

That the verdict is contrary to the law and evidence.

Errors of law occurring during the trial of the case, and duly excepted by the defendant.

That the court committed error by instructing the jury contrary to the law and the facts.

For such errors, the defendant-appellant now insists that the case should be reversed and remanded.

POINT I.

The Verdict Is Contrary to the Law and the Evidence.

Under sections 1 and 8 of the original Harrison Narcotic Act (Act Dec. 17, 1914, Ch. 1, 38 Stat. L, 787), it was provided that any person, who deals or dispenses, etc., narcotics shall register, and further, that any person not so registered, who possesses narcotics, shall be presumed to be guilty.

Under this law, the Supreme Court of this land was called upon to interpret such a statute, and in an able and exhaustive opinion, by a divided court decided as follows:

> "A statute must be so construed, if fairly possible, as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. United States v. Delaware & Hudson Co. 213 U. S. 366.
>
> This court cannot assume to know judicially that no opium is produced in this country; nor is it warranted in so assuming when construing a statute itself purporting to deal with producers of that article.
>
> When Congress contemplates the production of an article within the United States, this court

must construe the act on the hypothesis that such production takes place.

An attempt of Congress to make possession of an article—in this case opium—produced in any of the states a crime, would raise the gravest question of power. United States v. DeWitt, 9 Wall. 41.

In construing a statute which calls itself a registration or taxing act and does not purport to be in execution of a treaty and which contains a provision not required by any treaty, a grave doubt arises whether such a statute is entitled to the supremacy claimed for treaties on the ground that it does in effect carry out existing treaty obligations on the general subject of both treaty and statute.

While the Opium Registration Act of December 17, 1914, may have a moral end, as well as revenue, in view, this court, in view of the grave doubts as to its constitutionality except as a revenue measure, construes it as such.

Every question of construction is unique, and an argument that might prevail in one case may be inadequate in another.

Only definite words will warrant the conclusion that Congress intended to strain its powers, almost if not quite, to the breaking point, to make a great proportion of citizens *prima facie* criminals by mere possession of an article.

The words "any person not registered" in section 8 of the Opium Registration Act of 1914, do not mean any person in the United States, but refer to the class dealt with by the statute—those required to register—and one not in that

class is not subject to the penalties prescribed by the statute. 225 Fed. Rep. 1003, affirmed."

United States v. Jin Fuey Moy, 241 U. S. 394.

See also

United States v. Denker, 255 Fed. 339;
United States v. Wilson, 225 Fed. 82.

After this decision, Congress amended section 1 of the Harrison Narcotic Act, but did not amend section 8 thereof. The question therefore is: Is the law of the case of U. S. v. Jin Fuey Moy, 241 U. S. 394, still the supreme law of this land, or has Congress, by a later act, amended it so as to give it a different meaning?

From a careful resume of all the authorities in the United States, we are unable to find where the Jin Fuey Moy case *supra*, has in any way been modified, and from a reading of this case, in conjunction with the facts and circumstances of this record, it clearly shows that the defendant-appellant was guilty of no offense.

The reason for the verdict however, is apparent from a careful reading of the record. As above pointed out, the defendant was charged with dealing and distributing, and a sale. At the close of the Government's case, counsel for the defendant moved to dismiss as to count 2, which motion was denied, but such error was possibly cured by the charge of the court directing to the jury to acquit on the second count, leaving standing alone, count one.

Under this count, it is specifically charged that the defendant *did deal* and *distribute,* in violation of section 1 of said Act, *"and the said Clarence Lewis was then and there a person required to register and pay the special tax under and by the above said Act, and section 1 thereof."*

If the said Clarence Lewis was a person so required to register and pay said tax, under what law was he required to do so?

Under the Act itself, section 1, the persons required to register are importers, manufacturers, producers, compounders, wholesale dealers, retail dealers, physicians, dentists, veterinary surgeons, and other practitioners, lawfully entitled to distribute, dispense or give away any of the aforesaid drugs to patients upon whom they, in the course of their professional practice, are in attendance.

Following such classification it is stated:

> "Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.
>
> Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a retail dealer."

Now, clearly, the defendant-appellant does not come under any of these classifications.

For as was said by Justice Holmes in the case of U. S. v. Jin Fuey Moy, 241 U. S. 402:

> "Approaching the issue of this point of view, we conclude that 'any person not registered cannot be taken to mean any person in the United States; he must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1.'"

As above set forth, section 8 above quoted has not been amended, regardless of such fact, however, the court charged the jury that the defendant did not register, and that possession was presumptive evidence of guilt.

Before the defendant was required to register, he must have been a person referred to in the classes above enumerated, and the only class with which he was charged was being one who "deals in and distributes."

The word "deal" has been defined in the case of Foreman v. U. S. 255, Fed. 623, as follows:

> "To dispense is to deal out or divide out generally; to distribute is to deal or divide out in proportion or in shares. These words also connote ownership, possession, or control, actual, apparent, or pretensive, in the dispenser for himself or another, and the voluntary parting with the possession, ownership, or control; but the general allegation of dispensing or distribution would not indicate whether the voluntary part-

ing with possession, ownership, or control was by selling, or bartering, or exchanging, or giving. Hence, if the indictment had charged only distribution and dispensing, the words would be too general to indicate with certainty whether the particular statutory offense charged was sale or barter or exchange or gift of the drug."

See also

U. S. v. Lowenthal, 257 Fed. 444.

While generally speaking "deal" means to transact business; to trade; to trade in the selling of a thing; to make a business of it; to traffic; to traffic in, etc.

To deal in a commodity is to negotiate or make bargains in respect to that commodity, to traffic therein as buyer or seller.

17 *Corpus Juris,* 1153, and cases therein cited.

"And further—although a man commences to be a dealer from the moment when he buys the article with an intention to sell it again, the term implies a habitual course of dealing, and usually is employed to designate one who makes a business of buying and selling—one whose business it is to buy and sell, a merchant, shopkeeper, or broker, a trader, one who makes successive sales as a business, a person who seeks his living by buying and selling, a person engaged in the business of buying and selling merchandise, or other personal property in the usual course of trade."

Under the case of United States v. Lowenthal, 257 Fed. 444, count one of the indictment clearly charges

the defendant with but one offense, and that is that he did deal in and distribute narcotics, without having registered and paid the tax, and he being a person then required to register.

In the case of Hosier v. United States, 260 Fed. 155, the distinction is clearly made between sections 1 and 8, and section 2, and it is there pointed out that one who makes a single sale may be guilty under section 2, but that so far as 1 and 8 are concerned, such sections only apply to one making a business of dealing in such a commodity.

In the case at bar the evidence failed to show a sale, and the court so instructed the jury, and likewise there is an entire absence of proof that the defendant-appellant ever did deal in or dispense any narcotics, but only showed that he possessed some, being a user thereof.

The verdict is therefore contrary to the law and the evidence.

POINT II.

Insufficiency of the Evidence as Applied to the Charge.

On the question of possession the court instructed the jury as follows:

"The possession of drugs is presumptive evidence that the person is engaged in the business of dealing in or distributing such drugs. And any person who violates or fails to comply with any of the require-

ments of this Act shall upon conviction be punished, etc." [See transcript page 68, Par. 4.]

Further along in his charge he instructed the jury relative to dealing in narcotics as follows:

"To deal in narcotics does not necessarily imply that there must have been a sale. A man dealing in a thing has to offer it for sale and has to have it ready for sale. Now, it is obvious here in this case under the evidence that no sale was consummated, etc." [Tr. p. 69.]

The expressions taken by themselves would not have any effect on the average normal mind, but in a case of this nature the two parts of the charge quoted above when coupled together is tantamount to his saying: That while he is charged as a dealer, and there is no evidence of his dealing or selling, if you believe he had the drugs in his possession, then the mere fact that he may have had drugs in his possession raises a presumption in your mind strong enough to justify a conviction. This charge is fatal for the following reasons:

1. That the bare possession of narcotics is not presumptive evidence that the person is engaged in the business of dealer.

> "Evidence that the defendants charged as unlawful dealers in narcotics several months before in another district, had considerable quantity of morphine in their possession, held incompetent, where it was shown that they were habitual users of the drug." Paris v. United States, 260 Fed. 529.

In the above case it was shown that the defendant had in his possession twenty-six bottles of morphine and the court in reversing that case said:

> "If, upon this evidence, a jury could find that these defendants had the intent to carry on the business of dealers in morphine in Oklahoma City or elsewhere, it would be the duty of the judge on receipt of such finding to set aside, for there would be no substantial evidence here to sustain it."

Without evidence of evil intent no presumption against the defendant could possibly arise except the erroneous importance attached to such a presumption by the trial judge in his charge. The record shows that this defendant as a habitual user of drugs and under the Paris case *supra* he should not have been convicted except upon clear and certain proof.

2. Because the evidence fails to show any sale or dealing in narcotics at the time of his arrest or at any other time or place, but on the other hand it is admitted by the court in his charge that no narcotics were sold.

3. Because no proof or evidence was produced at the trial to show that the exhibits introduced to be the property of the defendants, were never identified as the property of the defendants, nor would they have been evidence had they been so identified.

Boyd v. United States, 142 U. S. 454; 12 Sup. Ct. 292; 35 Law Ed. 1077;

Hall v. United States, 150 U. S. 76; 14 Sup. Ct. 22, 37 Law Ed. 1003;

16 C. J. p. 586, Sec. 1133.

At the very strongest, the evidence introduced by the United States but creates a suspicion. The circumstances surrounding this whole transaction and all the facts introduced in evidence make but a feeble case at best. It has been held that evidence of similar acts or remotely relating circumstances, "of a vague and uncertain character" regarding such alleged offense is never admissable because it tends to draw the attention of the jury away from the consideration of the real issues on trial to fasten it upon other questions and to cause them to render their verdict according to their views on false issues rather than on the true issues on trial.

Baxter v. State, 91 Ohio State 167, 110 N. E. 546;

State v. Hyde, 234 Mo. 200; 136 S. W. 316, Annot. Cases 1912 D. 191; 16 C. J. 592;

People v. Shark, 107 N. Y. 427; 14 N. E. 319, 1 Am. St. Rep. 861;

State v. LaPage 57 N. H. 245; 24 Am. Rep. 69;

Fish v. United States 215 Fed. 545; 132 C. C. A. 56; L. R. A. 1915 A. 809;

Paris v. United States, 260 Fed. 529, Par. 1.

It is manifest here that the jury could not have convicted save for that part of the charge relating to possession.

4. Because the intent of the defendant was not an essential element of the offense with which they were charged in the case involved, after a sale or an attempted sale was not shown, since the evidence of the case before us is barren of any proof of a sale or even attempted sale or even an intended sale. There was no such evidence as will be required to sustain the conviction.

This indictment charged but one crime, that was that the defendant did "deal in and distribute" said narcotics.

It is one thing to deal in narcotics and another to have them in your possession. This defendant was not indicted for having drugs in his possession unlawfully and the question of possession should not have been allowed to go to the jury when the case of the United States fell down on the question of a sale or dealings. In other words the defendant was charged with one distinct crime in the indictment, his defense had prepared his defense along the lines of the crime alleged in the indictment, but the learned trial judge admitted proof of possession, and failed to exclude it from the jury after the prosecution had failed to connect said possession with a sale or an attempted sale, but on the other hand the jury was instructed very emphatically on the question of possession and as said above the minds of the jurors were so taken from the true issues in the case, to wit; the dealing in drugs, that it can safely be said that defendant was convicted on the theory of possession alone. The charge left the jury

no proper guide for weighing the evidence when considering and deliberating on the verdict. This question was very seriously considered in the case of Fish v. United States, 215 Fed. 544 *et seq.*, and the court's charge to the jury in that case, which is almost the same language as that employed in this case, was held on appeal to have been a fatal error. In that case the court charged as follows:

> "Now, in order to show that the fire was incendiary and not accidental, I have permitted certain evidence to be received about other fires. Now, this does not impose upon the jury the duty of trying the defendant for these other fires. It it not offered and it could not be offered for the purpose that he had burned the Senta and that he had burned an automobile, and therefore, you might be more readily induced to believe that he burned the yacht. This is not the purpose of this evidence and that is not what it is offered for or what it could be admitted for. It is for the purpose of showing that the fire was not accidental but was incendiary. The Government is not bound to prove and has not undertaken to prove that the defendant set fire to the yacht Senta, or to his automobile. If you are satisfied that those fires occurred you may use that fact, and the fact of any condition or assistance attempted or surrounding either or both of them, etc."

The appellate court in reviewing that charge said: (see page 550):

> "The court told the jury that they might use the fact of over insurance in the case of the first yacht and of the automobile, that they might use the fact of the defendant's financial condition or any of the other facts, some of which were that the defendant had his cousin shortly before to fire the automobile in the barn, procuring a permit from the insurors of the barn to keep the automobile in it, etc."

The pertinent injury which suggests itself on reading this instruction is, what relevance has any of these facts on any question other than the very one on which the court instructed the jury.

In the case at bar, after the Government had failed to show that a sale was even being contemplated, the question of possession then became irrelevant and should have been stricken out of the record, because the defendant was not being tried for possession and the charge in the indictment of his being a "dealer" of necessity fell with the proof. The only doubtful question in this case which could have been submitted the jury under the indictment was whether or not the defendant was dealing in narcotics and in all candor we submit that there is no evidence in the record to justify the conclusion that the defendant in any wise was a dealer.

The court practically told the jury that they might use the evidence of possession and convict the defendant whether a sale or attempted sale was made or not. Thus, it is patent that defendant was convicted be-

cause, he an addict, was alleged by the officers to have thrown a package away which is said to have contained narcotics.

CONCLUSION.

It therefore appears from the foregoing, that the evidence in this case is insufficient to justify the verdict, because there is no legal evidence in the record upon which this defendant can be convicted, and the court clearly erred in denying the defendant-appellant's motion for a new trial, from which we conclude that the case should be reversed and remanded, and a new trial granted to the defendant-appellant.

Respectfully submitted,

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Attorneys for Appellant.